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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 97

UNITED STATES OF AMERICA,
PETITIONER

VS.

R. F. BALL CONSTRUCTION COMPANY, INC.,
and UNITED PACIFIC INSURANCE COMPANY,
RESPONDENTS

Petition for Rehearing

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TO THE SUPREME COURT OF THE UNITED STATES:

Comes now the respondent United Pacific Insurance Company and petitions this court for a rehearing and prays that this court upon such rehearing affirm the judgments of the lower courts, and as grounds therefor this respondent would show to the court as follows:

When the representative of the Attorney General's office argued this case in the trial court, he in effect threatened the trial court by stating that if he did not decide this case in favor of the Government, the case would be appealed to the Supreme Court of the United States (no mention was made of the Court of Appeals), and it was further implied that the Supreme Court would reverse this case in favor of the Government because the Supreme Court did not decide cases against the United States Government. The Attorney

General's office apparently has now made good on this threat, because a bare majority of five members of this court, in a per curiam opinion, has reversed the judgments of the trial court and the Court of Appeals and decided this case in favor of the United States Government.

> "Traditionally, it may be pointed out that a 'per curiam' is the opinion of the court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion" *Newmans v. Lakeworth Drainage District* (S.Ct.Fla., 1956) 87 So. 2d 49.

See also 32 Words and Phrases 17, and cases cited thereunder, and 14 American Jurisprudence, 37.

We realize that the majority of this court, as presently constituted, has no hesitancy in breaking with tradition, and it has the power to re-define terms and even coin new words, such as the word "choate". See 42 American Bar Journal 608, July 1956. But we ask this court, in all sincerity, does it have the right, as distinguished from having the power, to "per curiam" this case when eight judges of the United States courts (one trial judge, three Appeals Court judges and four Supreme Court judges) have said that the two cases cited by the majority of this court as supporting its action, have nothing whatsoever to do with this case?

What is the question that is involved in this case? The trial court and the Court of Appeals stated the question to be as follows:

> "The principal question for determination by this court is as to which lien is prior—the Government's tax lien which arose by virtue of the filing of the notice of its tax liens in May, June and September

> of 1953, or the contract lien of the Bonding Company which arose long prior thereto by virtue of the assignment of the retained percentages in question by Jacobs to the Bonding Company which by contract protected the Bonding Company from the loss which it incurred on the Louisville job which became a potential loss upon the execution of the Louisville bond on April 4, 1952, prior to the filing of the Government's tax liens but which was not paid under its bond until after the filing of the Government's tax liens."

The dissenting opinion in this case states the question as being as follows:

> "The question presented is whether an 'assignment' made by a subcontractor to his performance-bond surety of all sums to become due for performance of the subcontract, as security for any indebtedness or liability thereafter incurred by the subcontractor to the surety, constituted the surety a 'mortgagee' of those sums within the meaning of sec. 3672(a) of the Internal Revenue Code of 1939, as amended."

We submit that the above are correct statements of the question that is involved in this case. Now let us see what the question was in the Security Trust Company case. As stated by this court in its opinion in the case of *United States v. Security Trust and Savings Bank*, 340 U.S. 47:

> "The question presented here is whether a tax lien of the United States is prior in right to an attachment lien where the federal tax lien was recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment."

And what was the question in the New Britain case?* This court stated the question very succinctly in its opinion in *United States v. City of New Britain*, 347 U.S. 81, wherein it said:

> "The question presented by this writ involves the relative priority of statutory federal and municipal liens to the proceeds of a mortgage foreclosure sale of the property to which the liens attached."

It is submitted that the questions involved in the *Security Trust* and *New Britain* cases did not even remotely involve the question that is involved in this case, and eight Federal judges have so held, but this court merely "per curiamed."

It will be noted that in the courts below it was stated:

> "The government argues that if an attachment or other judicial lien is not sufficiently 'choate' or complete 'to defeat a subsequent tax lien' then a mortgage to secure future indebtedness would likewise be inferior to a subsequent tax lien. Congress has in effect stated in Sec. 3672 that before an attaching or other similar statutory lienor can claim priority over the government his claim had to ripen into a final judgment. U. S. v. Security Trust, supra, U. S. v. Acri, supra. No such qualification was placed by Congress on the contractual lien of a 'mortgagee'. It is the Congress which enacts the law with reference to priorities and not the courts * * *."

We submit that the lower courts were correct in this statement and that this court has now judicially legislated

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*Upon oral argument of this case, Justice Frankfurter stated from the bench that he had never liked the decision in the New Britain case. It was therefore a disappointing surprise to see that Justice Frankfurter not only reaffirmed *New Britain*, which he disliked, but by his vote alone has now extended the principle of *New Britain* far beyond its previous scope and has made this principle apply to an ordinary business contract transaction.

into Section 3672 words which Congress not only did not include, but specifically refused to include. For, as stated by the lower courts:

> "* * * the Government is seeking to read into Section 3672 provisions which Congress has not seen fit to insert therein and the Government would have this court construe such section to read:
>
> > 'Such lien shall not be valid as against any mortgagee *whose mortgage is due at a certain time and in a certain amount and which mortgage has been duly recorded in accordance with law.*'
>
> Had Congress seen fit to make such a requirement it could have done so, but I decline to read these words into the statute."

The majority of this court seems to have no hesitancy in reading into the statute these words which Congress specifically declined to write into it when it amended Sec. 3672 in 1954. Does this not lend support to the conclusion stated by Judge Learned Hand in his recent lectures to the Harvard School of Law, that the majority of this court has, by a "*coup de main*" assumed the role of "a third legislative chamber"?*

We predict that Congress will not allow this judicial legislation to stand and will legislatively overrule this court's decision in this case, as it did this court's decision in *United States vs. Wunderlich*, 342 U.S. 98, and just as it did this court's decision in a somewhat kindred matter in the case of *Corn Exchange National Bank v. Klauder*, 318 U.S. 434, because, as Justice Jackson pointed out in *Security Trust*, supra, Congress has assiduously sought to prevent subsequently filed tax liens from serious interfer-

*The Bill of Rights page 55. Learned Hand. Harvard University Press 1958

ing with prior business transactions, but this will do the litigants in this case no good, nor those similarly situated, until Congress can act.

And what is the effect of this court's per curiam opinion which permits a subsequently fixed federal tax lien to displace a prior contract mortgage? As stated on page 30 of this respondent's brief in quoting from an address to the American Bar Association:

> "The commercial world will await the outcome [of this case] with extraordinary interest because the government's position, if successful, might subordinate a widely used credit arrangement — an assignment of money due or to become due under an existing contract as collateral security — such subordination being to a federal tax lien against the assignor, which tax lien was not in existence when the assignment was made but arose subsequently."

It is submitted that if this court intended to do the above it should do so in no uncertain terms and not leave the matter floating in orbit, as it has so done by giving this case the "per curiam" treatment. Already the Court of Appeals for the Fifth Circuit has called for re-argument in its Cause No. 16,723, *Commercial Standard Insurance Co. v. Campbell, et al*, as to what is the "effect" of the majority decision in this case, and the writer of this brief has received letters from all over the country asking his opinion as to what this court meant by its per curiam, but no one can tell with any degree of certainty just what the effect of this court's decision is.

WHEREFORE, this respondent prays that this court retract its per curiam opinion and adopt the dissenting opinion as the opinion of the court and affirm the judgments of the lower courts.

In the alternative, this respondent prays that at least this court write an opinion which will define the terms "inchoate" and "unperfected," so that this respondent and the business world generally may know how to prepare instruments which will pass the test of this court as to inchoateness and perfection and this court is asked to set forth in an opinion just what tests it prescribes, otherwise the decision of the court in this case will "seriously interfere with business transactions."

Respectfully submitted,

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